Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1772

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,

Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. RESPONDENTS HAVE STRAYED FROM THE EQUAL FOOTING DOCTRINE.

We submit that the Equal Footing Doctrine could not survive respondents' position. They would make a State's Equal Footing depend on whether the United States deigns to allow it. But Equal Footing is the States' constitutional *entitlement*, and is not a matter of federal beneficence or discretion. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). The Doctrine presumes Utah's title in the lakebed, imposes rigid trust

duties on the United States, and gives respondents the burden of proof regarding the Doctrine's exception.

The principles that must be applied here were settled in *Montana v. United States*, 450 U.S. 544 (1981), and prior Equal Footing cases. Many of those cases arose from a conflict between State title and a federal reservation, and the Court has always concluded that a reservation alone is not enough. Pet. Br. 7, 16-20. Only a specifically expressed *conveyance* to meet a *public exigency* can override State title, and the presumption is always for Equal Footing. *Montana* at 551, 552, 554, 556.

The bed of Utah Lake was not reserved; USGS, acting without authority, merely purported to withdraw it. But even assuming a valid reservation, as respondents do, they still cannot (and have not tried to) distinguish the Utah Lake "reservation" from the reservations in the other cases; and under those cases, Utah must prevail here.

Apparently recognizing the overwhelming burden they have under the settled law, respondents try to unsettle it. They want the Court to revisit and undo the Doctrine's core components. For example, they argue (sometimes subtly, sometimes blatantly) that they, not Utah, have the presumption of ownership; that sovereign lands enjoy no distinction over public lands; that the trust does not limit their discretion; that legislative silence defeats sovereign title; that they do not need a public exigency to defeat State title because any public purpose or federal use will do; that a new exception should be created by which reservations and withdrawals would per se defeat Equal Footing; that even the existing ex-

ception is more important than the Doctrine itself, and should be viewed primarily as an obstacle to State title, not as a restriction on federal action; and that Utah has the burden of proving the Doctrine's exception does not apply.

Those propositions diametrically oppose Equal Footing law. And respondents have necessarily gone outside the Doctrine to support their arguments. For example, they rely first on the Property Clause, which gives the United States "power to dispose of * * * property belonging to the United States." We do not deny that the United States may "dispose of" property that "belongs" to it, but *to whom* the lakebed belongs is the very question to be decided here. The Property Clause cannot answer that question; only Equal Footing law can. (The United States did not *dispose* of the bed of Utah Lake, anyway.) The Property Clause does not override the Equal Footing Doctrine, and respondents' interjection of the Property Clause shows their reluctance to face Equal Footing principles.[1]

They manifest that reluctance also in other ways. For example, they allege they should win this case on the basis of their "supremacy." Resp. Br. 14, 16, 19. But the Supremacy Clause does not defeat Equal Footing. This Court was fully aware of federal supremacy when it decided the Equal Footing cases.

Respondents seem to forget that the States *reserved* ownership of the beds of their navigable waters; that such

[1] Art. IV, §3, also states: "and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

ownership is an Equal Footing right "inherent" in their sovereignty, *Shively v. Bowlby*, 152 U.S. 1, 43 (1894); that "the Constitution itself," not Congress's discretion, assures that right, *Oregon v. Corvallis Sand & Gravel Co., supra*, at 374; that federal "law" (not federal desire) is supreme, and is supreme in a given case only insofar as it is relevant and comports with the Constitution. Of course, the Equal Footing Doctrine is itself federal constitutional law.

Respondents also disregard Equal Footing law by arguing that sovereign lands are "like any other federal lands." Resp. Br. 14. But if sovereign lands enjoy no distinction over public lands, why does the Doctrine so assiduously protect State title in beds of navigable waters, and why does the Doctrine exist at all? Their assertion is untenable; it belies long-standing constitutional law.

Respondents' position would demote sovereign lands and put them into one common, indistinguishable class of "federal land." The United States then would be free to do whatever it wants with "its" lands;[2] and with that established, the United States could hardly lose another Equal Footing case.

[2] The Court has already stated one danger in such federal ownership: "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 230 (1845). Respondents raise this threat by claiming the United States may convey sovereign lands to third parties unhindered by constraints of the public trust doctrine, which does limit State dispositions. Resp. Br. 45-46 n.25.

Respondents clearly want this case decided either outside the Doctrine or under a drastically changed Doctrine. And they could prevail here only on that basis. Besides depriving Utah of ownership, their position would distort and eviscerate fundamental constitutional principles and would impair State sovereignty. Neither fairness to the States nor proper application of the law will permit that.

It is appropriate to note that respondents' basic arguments in this case were also presented to the Court in *Montana*, but to no avail.[3] As we have demonstrated

[3] The United States' brief in Montana v. United States, **supra**, makes the following arguments: "It can no longer be doubted that the United States had the **power** to alienate or reserve to itself for a public purpose the bed and banks of navigable waters that otherwise would pass to the State upon its entry into the Union." **Id.** at 8; same at 12. "If, as we submit, the bed of the River was, prior to statehood, effectively reserved for the Crow Tribe, then the banks were as well. Similarly, if we are wrong, both passed to Montana upon its entry into the Union." **Id.** at 9-10. "We deem it beyond argument that the federal government, acting during the territorial period, could withhold from the future State the beds of navigable waters equally by withdrawing the area and dedicating it to a special public purpose as by alienation to others." **Id.** at 15, **citing** United States v. Alaska, 423 F.2d 764 (9th Cir. 1970). "The rule that federal title to navigable water bottoms inures to the State upon its admission to the Union applies only to the unappropriated lands of the United States. Plainly, it can have no force within an area held in trust for an Indian Tribe to which beneficial ownership is expressly conceded and whose interest is 'property' protected against appropriation or alienation by the Fifth Amendment." **Id. See also id.** at 28, 29.

The United States also relied, as they do here, on Shively v. Bowlby, 152 U.S. 1, 48 (1894), for their notion that no public exigency is necessary. Indeed, they undertook considerable analysis and argument in their attempt to avoid the public exigency requirement. Brief at 12-13. They also unsuccessfully argued that particular rules of construction (different from those required under the Doctrine) should be adopted. **Id.** at 17-18.

(Pet. Br. 34-36), Utah's situation here is even stronger than was Montana's, and since respondents' arguments were rejected in that case, they should fare no better here.

A. *Respondents Want to Reverse the Presumption of State Title.*

It is beyond doubt that, as a matter of Equal Footing law, Utah is *strongly* presumed to own the bed of Utah Lake. *Montana, supra,* at 552, 554; *Massachusetts v. New York,* 271 U.S. 65, 89 (1926). The Constitution presumes State title "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government." *Montana, supra,* at 552, citing *United States v. Oregon,* 295 U.S. 1, 14 (1935).

The presumption pervades the Doctrine, establishes the framework within which Equal Footing cases must be analyzed, and sets the respondents' burden of proof. Under the presumption, State title automatically obtains if respondents fail to prove any part of the Doctrine's exception. And that is a heavy burden indeed. State title recently was upheld even though the sovereign land was part of an Indian reservation that had been *conveyed* to the tribe by specific language, and even though the Court resolves doubts in Indian treaties in favor of the Indians. *Montana;* Pet. Br. 34-36.

Respondents try to invert the law, however. In their argument, the United States presumptively owns the lakebed[4] and Utah has the burden of disproving the elements

[4] Some of respondents' arguments state this position quite explicitly, while others advance it by necessary implication. For example: "* * * Congress has complete ownership of and sovereignty over [sovereign] lands * * *." Resp. Br. 7. Respondents also maintain that the lakebed must belong to them, without debate, by reason of the Property Clause and Article I. **Id.** at 7-8, 13, 44-45. "[T]he United States [has] prior and paramount rights" in sovereign lands. **Id.** at 10. "[W]hen submerged lands are still within a territory, there is no need for the United States to pay compensation in order to appropriate them, because the United States already is the owner." **Id.** at 14. "Congress may simply provide for the submerged lands, like any other federal lands, to be appropriated or reserved * * *." **Id.** at 14-15. "* * * Congress has expressly reserved the [lakebed] in federal ownership." **Id.** at 20, 23.

of the exception.[5] On both counts, just the opposite is true. The presumption of State title would mean nothing if respondents did not have the burden of proving the exception's applicability.

[5] Whereas **Montana** requires respondents to prove a congressional conveyance of the particular sovereign land by clear, especial and specific language and for a public exigency, 450 U.S. at 552, 554, respondents' argument is that Utah has failed to disprove the exception's applicability. For example, "Petitioner has not shown that this expansive language [of the 1888 Act] was understood by anyone to exclude the bed of Utah Lake * * *." Resp. Br. 35. We have indeed shown that the Act's silence could not defeat Utah's title, Pet. Br. 7-8, 14-16, 21-25, but the burden is on respondents in any event.

Respondents also confuse the exception: "A court cannot fashion an exception to such all-inclusive statutory text * * *." Resp. Br. 37. "The absence of any affirmative indication * * * to treat submerged lands differently from all other federal lands therefore undermines * * * petitioner's argument for an implied exception to the broad language of the 1888 Act." **Id.** at 38, 42. But respondents avoid the point and misstate Utah's position. Utah stands on its Equal Footing rights, which arise from the Constitution and do not depend on any statutory provision or exception. It is the United States that must be concerned about proving an exception—the exception to the Doctrine. If respondents wish to prove the Doctrine's exception, they may try. But they should not try to confuse the Doctrine's exception by arguing some supposed statutory exception. And the burden should not shift. The relevant question is whether respondents have proved the exception to the Equal Footing Doctrine.

Respondents try to reverse the burden of proof also as to the public exigency. In response to our showing that there was no public exigency to justify defeating State title, Pet. Br. 7, 9, 31-34, they argue that we have "not shown that Congress exceeded" its authority. Resp. Br. 44.

B. *The Doctrine's Exception Does Not Apply Here.*

As a matter of constitutional principle and precedent, it is truly exceptional when Equal Footing fails and State title is denied. The exception exists for the rare situation where the Government must convey sovereign land to meet an international duty or public exigency. The United States' power to encroach on Equal Footing is limited to that exception, which is deliberately narrow and difficult to establish. The exception is a touchstone for federal conduct, not a hurdle to State title.

Respondents are obviously uncomfortable with the purpose and requirements of the established exception, for they urge a new exception that would fit their case. Their exception would allow them to prevail even though they admittedly did not convey[6] the bed of Utah Lake (unless the withdrawal or reservation counts). Resp. Br. at 7, 17. Their exception would not enforce *Montana*'s requirement of *clear* and *specific* congressional language, and instead would sanction just the opposite, *i.e.*, it would defeat State title because the 1888 Act consists of "expansive language" (*id.* at 35) that *"broadly* provided for the selection of reservoir sites throughout the 'arid region.'" *Id.* at 8 (emphasis added), 34, 35, 38, 42. And their exception to Equal Footing would outright reject the requirement of a public exigency. *Id.* at 9, 44.

Under the established exception, Utah must prevail: The lakebed was never conveyed out of the federal trust; the 1888 Act is broad rather than specific, and does not

[6] Respondents admit the exception requires a congressional conveyance. Resp. Br. 7, 12-13.

even purport to affect (much less convey) sovereign lands; and there was no relevant "public exigency." While respondents have the burden of establishing all parts of the exception, they have established none of them, and even refuse to seriously acknowledge them.

1. The Doctrine's *sine qua non* is the indisputable legal distinction sovereign lands enjoy over lands in the public domain. If that distinction did not exist, there would be no reason for the Doctrine.[7] Pet. Br. 23-25. Inexplicably, respondents claim the distinction is irrelevant and only "supposed." Resp. Br. 35.

They criticize our pointing out that the 1888 Act and its legislative history do not refer in any way to sovereign lands. Resp. Br. 34-37. But that legislative silence is a fact (Pet. Br. 8-15, 21-30; Resp. Br. 34), and the Act therefore cannot defeat State title.

They also complain that we discuss "public lands" even though those words do not appear in the Act. Resp. Br. 35. (They also suggest the legislative history does not contain those words, but that is untrue.[8]) We discuss

[7] The distinction has been recognized and respected from the first. Pollard's Lessee v. Hagan, **supra**, at 221, 223-25 (1845). In Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892), the Court noted that State title in sovereign lands "is a title different in character from that which the United States hold in the public lands which are open to pre-emption and sale."

The "Manual of Instructions for the Survey of the Public Lands of the United States," Bureau of Land Management, Bull. 6 (1973) (hereafter "BLM Manual"), p. 4, states: "Beds of navigable bodies of water are not public domain and are not subject to survey and disposal by the United States. Sovereignty is in the individual states."

[8] The legislative history is full of references to public lands. The pages cited in Pet. Br. 27 n.15 expressly state or otherwise make clear that public lands were Congress's focus. **See also, e.g.,** 19

public lands because they are the Act's only subject. The Act's land-law imperatives, along with its silence about sovereign lands, show that Congress's intentions and expressions went only to publi[c] lands.[9] Pet. Br. 21-30.

Respondents rely on *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), for the immaterial proposition that under "regular" rules of construction a statutory reference to "public lands" does not necessarily exclude tide lands. Resp. Br. 35-36. But *Hynes* was a Property Clause case, 337 U.S. at 103-04, not an Equal Footing case, and therefore did not employ the Doctrine's special rules of construction that necessarily flow from the presumption of State title. *See Montana*, 450 U.S. at 552, 554; Pet. Br. 12-16, 35. Moreover, it was expressly given that nothing in the legislation could "impair[] in any degree the [State's] title" in sovereign lands. *Hynes*, 337 U.S. at 102-03, *quoting* the Act of May 14, 1898, 48 U.S.C. §411. And the particular legislation was to benefit the Alaskan Indians, and it was construed accordingly.[10] *Id.* at 110-11.

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[8] **Continued**
Cong. Rec. 7014, 7017, 7019, 7021, 7023, 7025-31, 8200, 8471, 8509, and Appendix 496 and 498 (1888). The 1890 Act also shows that the 1888 Act had pertained only to "public lands." 26 Stat. 391; Pet. Br. 29 n.16.

[9] Even if it showed only that Congress had not focused on Utah Lake and other sovereign lands, Utah's title would be safe under the **Montana** requirement of clear and especial words conveying specific sovereign lands.

[10] Contrary to respondents' suggestion, the distinction sovereign lands enjoy does not depend on the cases they refer to (Resp. Br. 36 n.20). See the cases we cite **ante** at n.7. But those cases do support our position. **Hynes** did not discredit those cases; they are still good law and represent sound principles. Nothing in **Hynes** militates against Utah's title in this case.

Respondents' remarkable difficulty in distinguishing between classes of land extends also to school lands. They try to counter the Utah Enabling Act's assurance of Equal Footing (Pet. Br. 37 & n. 21) by invoking an irrelevant provision about school lands (Resp. Br. 18-19), which are statutory grants expressly subject to prior federal reservations. Equal Footing lands, in contrast, are reserved by the States, are not part of the public domain in any sense that would make them subject to entry under the land laws, cannot be retained by federal reservation, and are not congressional grants at all. *Corvallis Sand & Gravel, supra*, 429 U.S. at 374.

2. Respondents' arguments are further vitiated by their dependence on the Property Clause, which has no relevance. To assert the Property Clause is to presuppose ultimate federal ownership of the lakebed, which presupposition would obviate and negate the Doctrine and its presumption.

They argue that State sovereign title must defer to the United States' powers under the Property Clause (which they allege empowers them to "dispose of" or "acquire" sovereign lands by "appropriation or reservation").[11] Resp. Br. 16. But, unequivocally, sovereign lands were not subordinated to the Property Clause. "The State's power over the beds of navigable waters re-

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[11] Respondents' argument that to withdraw or reserve sovereign lands is to "dispose of" or "appropriate" them is, first, immaterial (because a **conveyance** is required, regardless of how "dispose" or "appropriate" might be defined) and, second, it is unsupported. None of respondents' cases shows that a reservation constitutes a conveyance, disposal or appropriation that could satisfy Equal Footing requirements.

mains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana*, 450 U.S. at 551, citing *United States v. Oregon*, 295 U.S. 1, 14 (1935). *Accord: Weber v. Harbor Comm'n*, 18 Wall. (85 U.S.) 57, 66 (1873); *Hardin v. Jordan*, 140 U.S. 371, 382 (1891).

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), made clear that the United States' power to dispose of sovereign lands means only that it can convey them. The *Choctaw* reference to "dispose of," which respondents quote so often (Resp. Br. 12, 16, 37), is followed immediately by this clarification: "Rather, the question is whether the United States intended to convey title to the river bed * * *." 397 U.S. at 633. An administrative withdrawal or a statutory reservation is not a conveyance to a third party, and since title remained in the federal trust until statehood, title then passed to the State.

3. The Court's precedents show that a reservation or withdrawal alone cannot defeat Equal Footing. *See* Pet. Br. 7, 16-21, 34-38. The United States' arguments on reservations were briefed but rejected in *Montana* (*see ante* at 5 & n.3) and they have presented no reason to undo the long line of precedents.[12]

[12] Respondents cite (at p. 19) two Ninth Circuit opinions, United States v. Alaska, 423 F.2d 764, **cert. den.** 400 U.S. 967 (1970) and United States v. City of Anchorage, 437 F.2d 1081 (1971), for the proposition that a reservation may defeat State title. But those cases do not square with **Montana** or the other Equal Footing cases, and the Ninth Circuit itself has improved its analysis since **Montana**; **see** United States v. Aranson, 696 F.2d 654 (9th Cir. 1983). The Eighth Circuit clearly does not follow the Ninth Circuit's pre-**Montana** in-

The sum of respondents' case is that Congress intended to reserve sovereign lands. We emphatically deny that, for the 1888 Act shows an intention to reserve only lands subject to public entry or appropriation under the land laws. Pet. Br. 21-30. But even assuming Congress had intended to reserve sovereign lands, that would not be enough to defeat State title. Congress's reservations in *Montana*, *Holt State Bank*, 270 U.S. 49 (1926), *Choctaw*, and others,[13] were far more focused and were directed at far more specific lands than here. Yet, State title

[12] **Continued**
clination to favor reservations over State title. Yankton Sioux Tribe v. South Dakota, 796 F.2d 241, 244 (8th Cir. 1986): "The only recognized exception to the * * * [D]octrine is a congressional conveyance of the [sovereign land]."

[13] The United States unsuccessfully made comparable arguments about reservations in Nevada v. United States, 463 U.S. 110 (1983), which, although not an Equal Footing case, is instructive. The dispute involved water rights held by the United States for the benefit of both an Indian reservation and a federal reclamation project. The suit on their behalf by the United States against other water users was eventually settled. The United States later wanted to relitigate to get more water for the reservation, and the issue was whether res judicata prevented the new action.

The Government claimed additional water to meet a "necessary" purpose of the reservation, arguing that the executive order creating the reservation must have impliedly reserved a right for the water. **Id.** at 119. The Government's argument essentially was that it "owned" the water in some sort of trust for the project and the reservation, and that the Government therefore could, at any time, reallocate its water between its beneficiaries as it thought proper. **Id.** at 121, 126.

The Court rejected that proposition, holding that "the Government's 'ownership' of the water rights was at most nominal," and that the real ownership or beneficial interest was in those for whom the Government had held the rights in trust. **Id.** at 126.

Nevada shows that valid property rights need not yield to a conflicting, pre-existing federal reservation. The Court's comment in **Nevada** is apropos: "We are bound to say that the Government's position, if accepted, would do away with half a century [here, 140 years] of decided case law * * *." **Id.** at 121.

could not be defeated in those cases without a third-party conveyance.

4. Respondents' arguments about the 1888 Act and the later legislation depend on inferences[14] and a statutory construction foreign to the Doctrine. They cite numerous cases (Resp. Br. 19, 26-27, 31) that had nothing at all to do with Equal Footing, and which consequently had no occasion to apply the construction favorable to State title that the Doctrine's presumption necessitates.[15] *Montana*, 450 U.S. at 552, 554.

The one case that mentions Equal Footing, *Block v. North Dakota*, 461 U.S. 273 (1983), did not defeat State title under the Doctrine, contrary to respondents' suggestion (Resp. Br. 37). Rather, it held the Government immune from suit because of a limitations provision. *Block* at 288-89. In fact, "[t]he title dispute remains unresolved." "If the river is navigable, the land in

[14] **Montana** requires clear and especial congressional expression, not inferences, to defeat State title. Yet, respondents and the Tenth Circuit have reached far beyond the 1888 Act, which they argue was the authority for the withdrawal. They rely largely on subsequent legislative history and on "other [post-withdrawal] agency documents." Pet. App. 11a. But those sorts of derivative inferences do not satisfy constitutional requirements. And as the Court has admonished, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960). "It is the intent of the Congress that enacted [the Act] * * * that controls." Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979), **quoting** Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977).

[15] Respondents' cases run a wide gamut of irrelevancy, from retaliatory taxation under the Equal Protection Clause, Western & Southern Life Ins. Co. v. Bd. of Equalization, 451 U.S. 648, 671-72 (1981), to felonious conspiracy to violate civil rights, United States v. Price, 333 U.S. 787 (1966). They do not enlighten this case because they do not address the sort of construction the Doctrine's presumption makes necessary.

question belongs to North Dakota * * * regardless of whether" the State's suit was time-barred. *Id.* at 291 & n.27.

Respondents also cite *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150 (1983), which supports Utah's position, considering respondents' only hope here is to prove the Doctrine's exception. The 1888 Act expressed nothing about sovereign lands or a conveyance, and in *Jefferson* the lack of necessary expression precluded the desired exception. *Id.* at 162, 166. Both the Act and its "legislative history fall[] far short of supporting respondents' contention [for] an [exception] * * *." *Id.* at 159.

Respondents' various devices for construing the 1888 Act are not appropriate in this case and do not overcome Utah's title.[16] Given the 1888 Act's silence about sov-

[16] There are at least three problems with respondents' asserted administrative construction of the 1888 Act. First, USGS's purported construction was wholly self-serving. This is not a situation in which an agency's construction simply benefits one third party over another. Rather, USGS's construction here was a self-benefiting arrogation of authority, which led to the attempt to keep sovereign lands for the United States. Second, the record shows that over time the United States has been inconsistent about who owns the lakebed, while Utah has consistently exercised its ownership, use and control of the Lake. R. vol. IV, tabs A-K. Third, to say that USGS withdrew Utah Lake is not to say that the agency actually had authority, and if not authorized, the withdrawal is "inoperative and void, no matter with what seeming regularity the forms of law [USGS] may have * * * observed." Borax, Ltd. v. Los Angeles, 296 U.S. 10, 18 (1935), quoting Smelting Co. v. Kemp, 104 U.S. 636, 641 (1881). An agency cannot create authority for itself, Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726, 745 (1973), and cannot exercise authority it has not been given. Southeastern Community College v. Davis, 442 U.S. 397, 410, 412 (1979). In addition, the Attorney General's opinion respondents refer to, 19 Op. Att'y. Gen. 564 (1890), supports what we have said all along: The 1888 Act's purpose was to prevent entry and settlement of public lands under the land laws.

ereign lands and conveyances, "[t]he plain language of the statute itself * * * is sufficient to resolve the question presented." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798 (1984). "[I]f we are to give [the Equal Footing Doctrine] the scope that its origins dictate, we must accord it a sweep as broad as its language. We are not at liberty to seek ingenious analytical instruments" to avoid the Doctrine. *United States v. Price*, 383 U.S. 787, 801 (1966). If Congress had wanted to defeat State title, that intention "would have been clearly indicated by appropriate terms; and would not have been left for inference from ambiguous language." *Martin v. Waddell*, 16 Pet. (41 U.S.) 367, 416 (1842).

5. Respondents acknowledge Utah's argument that the 1888 Act's purpose was to prevent monopoly and speculation under the land laws. Resp. Br. 38. (The Act therefore could not have meant to allow the bed of Utah Lake to be withdrawn. Pet. Br. 21-30.) But respondents contend the withdrawal was appropriate because USGS had considered both raising and lowering the Lake's water level.[17] Lowering it, they argue, would have exposed the bed to entry "through abuse of the general land laws that Congress sought to prevent." Resp. Br. 39. Their position is not correct.

Any attempted or purported entry or appropriation

[17] Respondents admit that in 1888 Congress did not legislate to have the United States develop irrigation sites itself. That intention arose years later with the Reclamation Act of 1902. Resp. Br. 40. Respondents nevertheless cite 1890 legislative history to support their view of the 1890 Act as a declaration of "the Nation's irrigation policy" (Resp. Br. 30-31 & n.17), all of which is irrelevant to whether the purported withdrawal of Utah Lake was valid under the 1888 Act.

of the lakebed would have been void as a matter of constitutional law, for title is held for the State until statehood. Even assuming sovereign lands could *ever* be subject to the land laws, by 1878 the bed of Utah Lake was not. The United States' survey of Utah Lake began in 1856 and concluded in 1878 (except for 3 small segments, totalling 10 miles, completed in 1910), resulting in the surveyed meander line (R. vol. IV, tab F), which "segregated" the navigable water and its bed from the public domain.[18] The 1888 Act could have had no purpose as to the bed of Utah Lake.

6. Respondents vainly argue against the public exigency requirement. Resp. Br. 9-10, 44-50. They note (*id.* at 46) that *Montana* requires the conveyance to be for a public exigency, 450 U.S. at 552, 556, but they deny it nevertheless. Under their theory, virtually any public purpose or federal use would override State title. They rely on *Shively v. Bowlby* and various cases unrelated to Equal Footing.[19] But *Montana* clearly shows

[18] The BLM Manual (see ante n.7), p. 93, states: "All navigable bodies of water * * * are segregated from the public lands at mean high-water elevation. In original surveys, meander lines are run for the purpose of ascertaining the quantity of land remaining after segregation of the water area." See also id. at 175; Lee Wilson & Co. v. United States, 245 U.S. 24, 27 (1917); St. Paul & Pacific Railroad v. Schurmeier, 7 Wall. (74 U.S.) 272, 286-87 (1869).

[19] See Resp. Br. 9-10, 44, 47-49, where they argue that any "public use" or "proper" public purpose suffices. They rely on Property Clause cases, eminent domain cases, and cases under the Necessary and Proper Clause in their attempt to overturn a fundamental, long-standing feature of Equal Footing law.

Montana clearly states that while a reservation as in Alaska Pacific Fisheries v. U.S., 248 U.S. 78 (1918), may be an appropriate public purpose, a public exigency is required to defeat State title. 450 U.S. at 556. (Note that Alaska Pacific Fisheries was not an Equal Footing case; it involved a statute that, compared to the

that an "appropriate public purpose," as that phrase is used in *Shively*, must rise to the level of a public exigency before it can defeat State title. 450 U.S. at 552, 556; Pet. Br. 31-34. The fallacy of their theory is evident. If a simple public purpose or federal use could defeat Equal Footing, the federal reservations (which by nature are public purposes or uses) in such cases as *Montana* and *Holt State Bank* would themselves have defeated State title.

There was no public exigency here, nor even an "appropriate public purpose." Pet. Br. 33-34; Petition for Writ of Cert. 16; Reply Br. on Pet. for Writ of Cert. 5. Utah's title therefore must prevail regardless of whether Congress statutorily reserved the lakebed (and we emphatically deny any such congressional intent). Respondents argue (Resp. Br. 44) that Utah's position necessarily implies the 1888 Act is unconstitutional. Not necessarily so.

Without doubt, any legislation would be unconstitutional if its purpose were to defeat Equal Footing title where no international duty or public exigency existed. But the 1888 Act's constitutionality need not be reached here. Since there was no public exigency in this case, and the legislation on its face did not purport, in clear and specific terms or otherwise, to convey Utah Lake and other sovereign lands, State title prevails without

[19] **Continued**
1888 Act, was very specific, 248 U.S. at 86-87, and it applied the "rule that statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians." **Id.** at 89.)

further inquiry. In fact, any question of unconstitutionality arises only as a result of respondents' improper application (now and in 1889) of the Act.

C. *Respondents Would Dissolve Their Trust Obligations.*

1. The United States holds sovereign lands "only in trust for the future States." *Borax, Ltd., supra,* at 15, citing *Knight v. United Land Ass'n,* 142 U.S. 161, 183 (1891); Pet. Br. 13. Respondents acknowledge the trust but argue that it does not limit their discretion. Resp. Br. 11, 13. In particular, they allege to hold sovereign lands in trust also for "the Nation as a whole" under the Property Clause, which, they say, gives them "plenary power" and "full authority" to do with sovereign lands anything they think "appropriate." *Id.* at 13.

The United States does *not* hold sovereign lands in trust for itself. Rather, it holds sovereign lands in trust for the States under the Equal Footing Doctrine, irrespective of the Property Clause. There is no precedent for respondents' position, which they advance for the apparent purpose of negating the Equal Footing trust. For the "trust" they want would give the trustee plenary discretion, with no obligations to the beneficiary; and that would be no trust at all.

2. We submit that if Utah's constitutional entitlement depends on whether or not the United States will allow it, then the States do not have much right at all. Utah and the 33 *amici* States urge the Court not to adopt respondents' proposed changes in the Equal Footing Doctrine, which goes to the heart of State sovereignty and

federalism. Equal Footing of the States should not be depreciated, and certainly not for the sake of a federal withdrawal that was not authorized and never necessary.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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MARCH 1987